United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7472

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

x - x

TOMAS ROSARIO, OVIDIO VEGA and RAY CABEL,

Plaintiffs-Appellees,

- against -

AMALGAMATED LADIES' GARMENT CUTTERS' UNION, LOCAL 10 of I.L.G.W.U. and INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO,

Defendants-Appellants.

C/A Ref. No. 76/7472

South. Dis.
76 Civ. 3204 (CBM)

x - x

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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APPELLANTS' REPLY BRIEF

Appellees' Brief contains a profusion of unresolved issues and disputes which are the subject of appellants' undecided motion for summary judgment, and which are not the subject of any findings or conclusions made by the Court below and are therefore not properly before this Court. We proceed to a point-by-point examination of the contents of appellees' Brief.

I

The Manager of Local 10, Abe Dolgen, filed charges not as Manager of Local 10, as misstated on page 3 of appellees' Brief, but as an individual member of that Local (JA 57). The specific charges are set forth in full at JA 50, 61.

II

There is no basis for the many misstatements of appellees' counsel in his Brief on pages 3-6 and elsewhere. It is erroneous to state that, because the first two previous decisions of suspension of the accused were set aside, they are therefore "admittedly invalid." Appellees' counsel's statement on page 4 of his Brief that the Appeal Committee gave spurious reasons for setting aside the first decision and upholding the second suspension is unsupported by anything contained in the stenographic proceedings in the Court below. These matters are the subject of another action (pp. 3-5 of our main Brief) which is sub judice before the same District Court Judge.

Further, there is no proof in the stenographic record that "Dolgen himself (the charging party) sat as a trial committee member" or that, at the second trial, the "trial committee was composed of the same persons, who as members of the first trial committee, had unanimously judged the three members guilty."

The confusion which appellees' counsel seeks to create is to put in the same category two different committees: (a) the Executive Board of Local 10 sitting as a Grievance Committee which heard the first two trials, and (b) the Trial Committee which was elected to hear the third trial which is the subject of this action.

Nor is there proof in the stenographic record that the Trial Committee which tried the accused was elected "in a manner calculated to result in a handpicked one" or that the notice of the meeting which elected the Trial

Committee "was not posted on Local 10's bulletin board until a week before the meeting" or that, as a result, the "turnout for the meeting was extremely small." The statements in the accused's affidavits in the Court below are denied in the affidavits submitted by appellants (JA 194-198, 244-246, 268-269, 339-360, 398-400).

There is no requirement in law that the Trial Committee had to be elected by secret ballot and appellees admit that no audible demand was made therefor (p. 5 of appellees' Brief).

Most important, the Court below made no findings in support of appellees' contentions. Indeed, it made no findings at all with respect thereto. Therefore they are not properly before this Court.

III

Counsel for appellees' references on pages 3-4 of his Brief to the first two trials are not only inaccurate but also irrelevant. Evidence of the decisions rendered by the Appeal Committee of the General Executive Board were improperly admitted, over appellants' objection (JA 110, 120, 134), because, as is conceded in the first footnote on page 4 of appellees' Brief, they are the gravamen of a prior pending action before the same District Judge which has still not been decided. This is especially true since the Court below, when referring to these earlier decisions, stated, "I don't see how that is relevant here." (JA 121).

IV

The accused did demand of the Trial Committee copies of the official

minutes of the two previous trials, but these minutes were not denied them by the Trial Committee. The Chairman of the Trial Committee wrote to the accused:

> "I cannot go into the question, at this time, of the minutes you require of Brothers Klein and Lipsig. Neither I nor the Trial Committee can make any ruling until we hear the arguments why these documents are necessary to prepare for a new trial and why the minutes requested have been refused. Our Trial Committee will make this ruling only if you appear at the adjourned hearing without a tape recorder or any other electronic recording device and after we hear the arguments." (JA 264)

The statements beginning in the last paragraph of page 5 and continuing on page 6 of appellees' Brief, that the official minutes of the first trial had been falsified and the manner in which they were taken guaranteed their inaccuracy are self-serving and untrue. Since appellees allege that they never received the minutes of these hearings, it is difficult to understand how they can allege they are false. They never did indicate to the Court below the respects in which these minutes were inaccurate or falsified.

The Court never made a determination of this claim or a finding of fact with respect thereto and it is not properly before this Court. (See p. 17 of our main Brief.) It is the subject of the prior pending separate action before the Court below which has yet to be decided. It is entirely irrelevant to any issue in this case.

The minutes of the trial held before the Trial Committee on December 18, 1975, were sent to each of the accused. Appellees never alleged that the minutes were inaccurate in any respect.

The accused never offered to read any statement at the January 8, 1976 meeting. They never attached a copy of it to any of their affidavits, and it is quite evident that if they had made such a statement they would have submitted it to the Court below with their affidavits. They never did.

We wish again to remind this Court that the Court below never made a finding on this disputed claim.

V

The rest of the statements which appear on pages 6-7 of appellees' Brief, except for the last paragraph on page 7, are also self-serving and untrue. They are denied unequivocally in appellants' affidavits which state what actually happened (JA 390-391, 415-416, 417-418). The accuseds' affidavits did not state, and the stenographic record in the Court below did not show, in what respect the prior minutes were inaccurate. (See p. 17 of our main Brief.) Besides, the Trial Committee which heard the charges in the present case was elected by the membership of Local 10 to hear the charges and was entirely different and separate from the Grievance Committee which had heard and decided the charges in the two prior decisions.

VI

The statements made on pages 8 and 9 of appellees' Brief do not appear in the stenographic record in the Court below. The statements attributed to James Lipsig are half-truths. Lipsig's affidavits which detail the true facts are contained in JA 482-526, and we rest upon them. We discuss them on

page 18 of our main Brief. See also JA 482-526.

VII

The statement on page 9 of appellees' Brief that appellees Rosario and Cabel were let into the membership meeting of Local 10 held on February 9, 1975 is incorrect. What actually occurred is that they broke into the meeting as set forth in a sworn affidavit of the Sergeant-at-Arms at that meeting (JA 423-424).

Again, the Court below made no finding on this point. It is not before this Court.

VIII

The statements of counsel for the appellees on pages 11-14 of his Brief contain deliberate factual distortions, the outrageous inclusion of a long footnote which is not part of the stenographic proceedings of the Court below, a statement of Mr. Schlesinger taken out of context, and a complete misunderstanding of the appellants' position:

(a) Counsel for the accused did not open the proceedings in the Court below by stating "plaintiffs' readiness for an evidentiary hearing if that was desired by the Court." The following actually occurred: (JA 39)

MR. HALL: Your Honor, I am not certain whether your Honor intended an evidentiary hearing or not. I have my client with me. I am prepared for an evidentiary hearing but since we are going to argue the matter --

THE COURT: You have a motion for preliminary injunction. I

believe the defendants have a cross-motion for summary judgment, is that it?

MR. HALL: That's right, your Honor.

MR. SCHLESINGER: There are two motions, your Honor.

THE COURT: All right. We will hear the plaintiff's motion and then we will hear the defendant's motion.

(b) Where is there any basis for the statement of counsel for the appellees, on page 10 of his Brief: "Since it was apparent that the Court was familiar with the affidavits . . . . " or his statement in the footnote on page 16 that "As the transcript of the three hearings indicate, the Court below entirely studied the affidavits and memoranda submitted and was entirely familiar with them"?

The stenographic transcript is replete with illustrations that the Court below neither read the pleadings or the many affidavits in support of and in opposition to appellees' motion for a preliminary injunction and in support of and in opposition to appellants' motion for summary judgment. There was lost in the shuffle another motion made by the appellees in the Court below for consolidation of the action with the other pending action, which was opposed by the appellants. The Court below was not even aware of the existence of this motion. (JA 40, 41, 42, 43, 47-48, 49, 56, 57, 58, 60, 69, 72, 79, 80, 81, 82-83, 84, 85, 87-88, 122, 123, 126, 127-128, 140, 151, 164, 166-167.)

The Court below only cited two cases: Sonesta which was not contained in any of the memoranda of law submitted by either party, and the Kiepura case which was mentioned by counsel for appellants (JA 165), excerpts

of which were read by counsel for Local 10 in the proceedings below (JA 164-166). This is evidence of the failure of the Court below to read even the memoranda of law submitted to it.

(c) Neither the plaintiffs nor defendants in the Court below were required to request an evidentiary hearing. It was for the Court, in its discretion, to exercise the option of either studying the affidavits and memoranda of law submitted, supplemented by oral arguments, or holding an evidentiary hearing followed by oral argument. S.E.C. v. Frank, 388 F.2d 486 (2d Cir. 1968). The Court below did neither.

It started by stating that it will hear oral argument on plaintiffs' motion for a preliminary injunction and on defendants' motion for summary judgment (JA 39). Then it switched its position and declared that it was holding an evidentiary hearing (JA 94, 138-140), obviously because it had not read the affidavits and memoranda of law which had been submitted. It stated, "I don't want to hear any more arguments, charges and counter-charges. We want testimony, evidence, so that I can make findings of fact . . . ." (JA 139). "And at the end of all of the evidence I will hear argument." (JA 134).

As the stenographic record of the proceedings in the Court below and as our main Brief amply demonstrate (pp. 10-16), the Court held no evidentiary hearing and heard no arguments at the end of all the evidence for there was none.

The statement of counsel for appellees on page 12 of his Brief, that no evidentiary hearing was necessary is not only pure distortion, but

it is absolutely untrue, as are the statements on pages 12 and 17 of his Brief that the two unions had opposed the holding of an evidentiary hearing.

The footnote on pages 10 and 11 of appellees' Brief is outrageous. It does not constitute part of the proceedings in the Court below. It was contained in a letter sent by Mr. Schlesinger to Mr. Hall in answer to a letter which Mr. Schlesinger received from Mr. Hall. Copies of both letters were sent to the Court. The letters are annexed as Appendices to this Reply Brief should this Court care to read them.

The quote from Mr. Schlesinger's letter in the footnote on pages 10 and 11 of appellees' Brief was one paragraph of an eight page letter. It conforms with the position which the Court below initially took.

(d) It is true that counsel for Local 10 stated that what is involved in this case are pure questions of law. That is still the position of the appellants. They are discussed on pages 15-16, 34-39, 42-43 of our main Brief.

These questions of law are:

(i) Were the accused entitled to tape record their own hearing in defiance of the Trial Committee's ruling that they may not do so?

(ii) Upon refusal by the accused to obey the ruling of the Trial Committee, may the latter treat such refusal as a voluntary absence from the disciplinary hearing, especially after the accused received due notice to be present without

tape recorders and after having been timely informed that a hearing would be held in their absence if they again insisted upon using a tape recorder? Was the Trial Committee justified in proceeding as it did, including giving due consideration to the joint statement submitted by appellees in their defense to the Trial Committee?

The Court below recognized that these were the questions of law involved (JA 59-62, 144-145, 159-160). Even counsel for appellants stated (JA 72, 74):

> "But the issue of whether you can make a tape recording -- bring a tape recorder -- is a question quite close to the center of the case."

Because the Court below recognized that "everything hinges on the tape recorder" (JA 62), it should have decided the above issues of law instead of evading them and it should have decided them in favor of appellants, for the reasons stated in our main Brief. If it had done so, the other findings of fact which were made and which were clearly erroneous, as demonstrated on pages 30-46 of our Brief, never would have been made; they would have been not only superfluous but also irrelevant.

(e) This Court need not consider the question of appellants' right to bring a stenographer at its own expense to check on the official minutes taken by the Secretary of the Trial Committee, since the Court below found that appellees never asked for the right to bring a stenographer (JA 168), and appellees appear to concede this fact in the footnote on page 22 of their Brief.

The finding by the Court below that "plaintiffs would not have been allowed to bring a public stenographer to the hearing even if they had requested permission to do so" presents a hypothetical, "iffy" question which is not a justiciable issue. Until the question of a stenographer is demanded, "no ripe case or controversy" (p.27 of appellees Brief) is presented and it should not be decided.

If the Court should reach the issue concerning a stenographer, the reasons why neither it nor a tape recorder should be allowed is covered in our main Brief (pp. 15-16, 34-39, 42-43). See also JA 52, 54-55, 76.

IX

The transcript of the proceedings in the Court below shows once again what a master of convolution and distortion counsel for the appellees is by his statement on page 19 of his Brief that the third hearing before the Court was necessitated by "The inability of the witness he [ILGWU's counsel] produced at the second hearing to answer the question whether, had the three members brought with them to the Appeal Committee hearing a public stenographer instead of a tape recorder, they would have been allowed to make a stenographic transcript of the proceedings."

All this Court has to do is to read the last statements made by the Court below at the very end of the hour proceeding held on September 14, 1976 (JA 138-140), quoted in full on pages 13-14 of our main Brief. It will demonstrate, beyond cavil, the falsity of the statement made by appellees' counsel.

X

With respect to the first sentence of the first full paragraph on page 20 of appellees' Brief, the Court below did not find in favor of appellees' contention that they were improperly denied access to the minutes of their two prior disciplinary proceedings which they considered necessary for their defense. The reasons why these minutes were not given were stated by Mr. Schlesinger on the first day of the proceedings (JA 60).

The statement in the second sentence of that paragraph that it is "clear and undisputed that their (appellees') lay counsel, who did not have any tape recorder with them, were also excluded from the hearing" is false. The statement comes from the reply affidavit of Spitzer, one of the accuseds' lay counsel, in support of the motion for a preliminary injunction. His statement was very seriously disputed in the joint reply affidavit of the Chairman and Secretary of the Trial Committee. They swore under oath as follows: (JA 390-391)

> "5. The averments in Paragraph 4 on pp. 1-2 of Spitzer's affidavit is an apparent, obvious last-minute attempt to besmirch our Trial Committee and, to inject, ingeniously, a matter that was never presented to the Trial Committee.
>
> "Messrs. Spitzer and Kurtz both represented the plaintiffs at the hearings before our Trial Committee.
>
> "When our Committee's ruling was announced that tape recorders could not be used to tape the hearings and that plaintiffs would have to remove them from the hearing room, neither Spitzer nor Kurtz dissociated himself from that ruling. Neither one of them stated or suggested that he was willing to attend the hearing with or without any of his 'clients' without tape recorders and neither requested permission to represent their 'clients' at

the hearing which was held in the other room by reason of the refusal of the plaintiffs to obey the Trial Committee's ruling that they remove the tape recorders from the hearing room and put them out of operation.

"Spitzer's statement in Paragraph 4 on pp. 3-4 of his affidavit and in Paragraphs 14, 15 and 16 on pp. 6-7 of his affidavit is a belated effort on his part to create a new issue now where none existed before.

"We respectfully submit to the Court that if Spitzer is really serious about the above statements which he made, all Spitzer and/or Kurtz should have done was to open the hearing room or knock on the door of the hearing room, which Spitzer does not say he or Kurtz did, and announce that Spitzer and/or Kurtz was ready to continue to proceed with or without their clients and without a tape recorder. We assure the Court, indeed, we swear, that they would have been welcome and they would have been permitted to participate.

"This effectively disposes of Paragraph 19 on pp. 7-8 of Spitzer's affidavit."

Once again, the Court below made no findings on this disputed issue.

XI

We contest each and every statement contained in the first full paragraph on page 21 of appellees' Brief.

With respect to the matter set forth in (a), the Court below did not find that any of the minutes of the Grievance Committee of Local 10 or of the Trial Committee which heard this case or any of the minutes of the GEB Appeal Committee were inaccurate.

With respect to the matter set forth in (b), the official minutes of the Trial Committee which heard the present case were completely accurate, and the minutes of the December 18, 1975, hearing were sent to each of the accused,

none of whom pointed out any inaccuracies. All of the minutes of the hearings were sent to appellee Rosario who requested them and were available to the other accused upon request. They did not make any request apparently because they had access to the minutes which had been sent to their confrere, Rosario.

With respect to the matter set forth in (c), this is an "iffy" issue and it has been suggested above under VIII (e) that this Court does not have to decide it if it does not desire to do so, because it presents no justiciable controversy.

The Court below made no findings with regard to the above and none of these matters are before this Court.

XII

The argument on page 23 of appellees' Brief that there was no showing "that any fact material to such issue was genuinely disputed" is arrant nonsense.

All of the issues are in hot dispute. The affidavits of appellants' witnesses are replete with denials of appellees' false assertions (JA 194-198, 244-246, 268-269, 339-360).

Appellants' Memorandum of Law submitted to the Court below dealt with the legal problem of whether the discipline imposed upon the accused violated the LMRDA and demonstrated conclusively that it did not. It will be resubmitted infra, although we believe that this issue is not before this Court since no finding was made by the Court below on this subject.

XIII

With respect to the argument of counsel for appellees on pages 23-26 of his Brief, concerning appellees' failure to exhaust intra-union appeal remedies, we rest upon what we stated on page 9 and pages 18-28 of our main Brief. It is clear that appellees aborted the intra-union appeal remedy because on their own admission they did not want to be tried on the charges against them (JA 122) within the Union (and not in a trial of this action by the Court, as counsel for appellees ridiculously suggests in the footnote on page 27 of his Brief).

However, we point out that the Court below, in its oral findings on September 17, 1976, found that plaintiffs' appeal before the GEB Appeal Committee "was in progress apparently when this action was commenced." (JA 167-168).

Further, we find no warrant anywhere in the oral opinion or in the Memorandum decision of the Court below or in the stenographic proceedings for the statement by appellees' counsel in the first full paragraph on page 26 of his Brief that the non-exhaustion argument "is simply a (false) argument of substantive law which the Court below rightly rejected."

Indeed, the Court below erred in not making a finding of fact that appellees did not exhaust their intra-union appeal remedies which were in progress at the time this action was commenced and which they aborted. The Court below also erred in failing to order appellees to exhaust their remedies by proceeding with their appeal upon the terms of the offer made by ILGWU's

counsel, as amended by the Court.

The appeal from the order below can only be based upon the findings of fact and conclusions of law made by the Court below. Appellees' counsel has gone far beyond the scope of the issues properly before this Court and has argued matters which are completely off limits on this appeal. The only issues are questions of law which the Court below evaded. For the reasons demonstrated in our main Brief, and supplemented herein, these issues of law must be decided in appellants' favor to avoid an unwarranted intrusion by the courts in the internal affairs of unions -- intrusions not contemplated by any act of Congress. If the issue is resolved in appellants' favor, then all the other findings and conclusions made by the Court below fall of their own weight because they are superfluous and irrelevant.

XIV

Point II of appellees' Brief represents a gross misstatement of the law. Deacon v. Operating Engineers, Local 12, 59 LRRM 2706, 2709, 52 CCH Lab. Case, ¶16, 605 at 23, 399-400 (S.D. Cal. 1965), Jacques v. Longshoremens' Local 1418, 246 F. Supp 857, 860 (E.D. La. 1965), and Falcone v. Dantinne, 288 F. Supp. 719, 727 (E.D. Pa. 1968), reversed on other grounds, 420 F.2d 1151 (3d Cir. 1969), do not stand for the proposition that an accused member has the right to make or have made a stenographic or tape record of union trial proceedings. In Deacon, this issue was not decided as the union had voluntarily agreed to either a certified court or deposition reporter. The court

thereupon denied plaintiffs' request to enjoin the union disciplinary hearing.

Similarly, in Jacques, supra, the issue of whether the union has an obligation to make a stenographic record was not even raised. The holding in Jacques turned on the union's failure to conduct a trial in accordance with its own constitutional provisions. Although the court directed that some kind of written record be made of the trial, it did not specify the type of record that was required. Finally, in Falcone, supra, the court merely noted that, while it might have been "prudent" to wait until a reporter was present, it was not error to proceed in the absence of one.*

Moreover, even if the above cases did stand for the proposition that a union has an obligation to make a stenographic record of its proceedings,**

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* The inappropriateness of these cases as support for the proposition for which they are cited by appellees also demonstrates the highly questionable nature of the Etelson & Smith article cited on page 30 of appellees' Brief. These are the only cases cited by Etelson and Smith. The authors fail to cite -- or even refer to -- the legislative history of the LMRDA, discussed on pages 35-39 of our main Brief, which clearly demonstrates the error of their conclusions. As can be seen from the footnote description of the authors' background, on page 727 of their article, they are not authorities in the field and their article may be their maiden voyage in LMRDA analysis. In the seven years that have gone by since the article was written, the only cases involving a stenographer recording the disciplinary hearing were the Kiepura case (cited on p. 31 of appellees' Brief and fully discussed on pp. 40-42 of our main Brief, which specifically held: "We do not hold that the use of a court reporter is a necessary element of a 'full and fair hearing.'", and the Hart case (cited on pp. 32-33 of appellees' Brief and noted on pp. 42-43 of our main Brief and discussed infra) in which there was a provision in the union's constitution requiring that the union's trial committee stenographically record the proceedings.

** As indicated above, the cases do not stand for this proposition and they could not, without clearly contravening legislative history. (See appellants' main Brief, pp. 35-39.)

this proposition was not at issue in the Court below. Even appellees conceded that there was no need for the Union to make such a stenographic record and that the issue of the union's duty to do so was not involved in this case (JA 168). Rather, the issue in this case was -- and is -- whether or not appellees have the right to make their own tape recording of Union disciplinary proceedings against them; the issue of the type of record that the Union makes is not in any way involved herein. Thus, even if the reasoning of Etelson and Smith is accepted, the proposition that they advocate is not the issue in this case.

The other cases cited by appellees are similarly inapplicable to this case. In Keubler v. Cleveland Lithographers & Photo U. Loc. 24-P, 473 F.2d 359 (6th Cir. 1973), the court set aside a finding of guilt by a trial committee, in part, because it refused to supply the accused with, among other things, the transcript of the trial.

This was not denied to appellees in the present case. Rosario requested a copy of the transcript and it was mailed to him. The other two appellees did not request it. They could have examined it in Local 10's office but did not avail themselves of the opportunity to do so.

Kiepura v. Local Union 1091, United Steelworkers, 358 F. Supp. 987 (ND Ill. 1973) is fully analyzed in our main Brief (pp. 40-42). Sheldon v. O'Callaghan, 497 F.2d 1276 (2d Cir. 1974) is irrelevant, as the issue of a member's right to mailing at his own expense has no bearing on this case.

Finally, appellees cite Hart v. Local 1292, 341 F. Supp. 1266 (ED NY 1972), aff'd, 497 F.2d 401 (2d Cir. 1974), to support their contentions that they were excluded from their trial and were thereby denied a full and fair hearing.

However, appellees' Brief misstates the actual facts and conclusions in that case in the following respects:

(1) The quote from the Trial Committee's report omits from the first paragraph the following critical sentence:

> "Considering Bro. Hart's desire to be fairly heard and proper records kept of the ensuing trial, the Secretary was requested to take notes at the trial as well as record the proceedings electrically."

(2) In Hart, the critically important factor upon which the decision of the Court turned was that the Union disregarded its own constitutional provision that there be a competent stenographer to take the minutes of union disciplinary hearings. The facts in Hart were that Hart came in with a tape recorder because, contrary to the constitutional requirement, there was no competent stenographer to take the minutes of the disciplinary proceeding against him. Thereupon, the Chairman, in violation of the constitutional mandate, requested the Secretary to take the minutes and he himself put into operation a tape recorder, although he had denied the same to Hart. These facts are in sharp contrast to the instant case, where the Union fully complied with its own constitutional requirements and where appellees had an undisputed right to make their own notes of the proceedings as the Court below found (JA 5), thus putting

them on a par with the Union.

(3) Finally, appellees incorrectly cite Hart for the proposition that a union member cannot be excluded from his own trial. The Court of Appeals in Hart stated: (at 402)

> "The facts in this case are fully set out in the opinion of the district court, which is reported at 341 F. Supp. 1266. Briefly, in December 1965, Thomas Hart was tried in a union disciplinary action by a trial committee of the District Council of Nassau County, United Brotherhood of Carpenters, on the charge that he threatened the life of the Local Union 1292 business representative. The committee found him guilty, and the District Council ordered him expelled from the union. Hart appealed to the General President of the Brotherhood, who reversed the District Council and ordered a new trial on the ground that there had been no stenographic record at the original trial. In June 1967, after failing to appear on due notice, Hart was tried in absentia and found guilty of the same charge. The District Council imposed fines totalling $200."

Thus, the Court of Appeals did not adopt the reasoning of the District Court set forth on page 33 of appellees' Brief. That is, the Court of Appeals sustained the District Court only on the basis of the union's failure to comply with its own constitutional provisions requiring a competent stenographer, without in any way relying on Hart's exclusion from the trial.

Hart, therefore, does not provide any support for appellees' position. If anything, Hart provides support for appellants' position on both exhaustion of remedies and on the right of the union, under certain circumstances, to conduct a trial in the absence of the accused. Id. at 402. Cf. Illinois v. Allen, 397 U.S. 337 (1970).

XV

Point III of appellees' Brief is similarly replete with inaccuracies. Keubler and its application to requests for minutes has been discussed above.

As for appellees' counsel's discussion of the effect of the discipline imposed on appellees, no finding was made on this issue by the Court below, as we noted on p. 17 of our main Brief. However, if the Court is interested in appellants' position on this issue, we will quote from the Brief submitted to the Court below:

LMRDA, §101(a)(5) requires a hearing for any union member before he may be "fined, suspended, expelled or otherwise disciplined." After the opportunity had been afforded to the plaintiffs for a "full and fair hearing" and such hearing was held plaintiffs were found guilty and were suspended from attending and participating for a limited period in Local 10's membership meetings. Plaintiffs contend that such discipline is not authorized by the Act and that so long as they retain membership rights -- that is, so long as they are not suspended or expelled -- they have a right to attend and participate in Local 10's meetings. Plaintiffs' position is peculiar in that it seems to require a union, if it is to impose any discipline at all, to impose the more severe punishment of complete suspension or expulsion rather than the modified suspension that the Grievance Committee imposed.

Local 10's position is that the discipline imposed upon plaintiffs by the Trial Board clearly falls within the language of the Act ("No member of any labor organization may be . . . otherwise disciplined . . . ."), and is, there-

fore, a proper form of discipline. The Grievance Committee of Local 10 recognized the severe consequences of a complete suspension of membership and was, accordingly, lenient with the plaintiffs. The discussion by the Court in Soglin v. Kaufman, 295 F. Supp. 978, 988 (W.D. Wis. 1968), aff'd 418 F.2d 163 (7th Cir. 1969), regarding suspension from school is equally applicable to suspension from union membership

> . . . [I] n the present day, expulsion from . . . [a union] or suspension for a period of time . . . may well be, and often is in fact, a more severe sanction than a monetary fine or a relatively brief confinement imposed by a court in a criminal proceeding (Quoted in Falcone v. Dantinne, supra, at p. 1164).

If courts were to adopt plaintiffs' interpretation of the Act, a union's flexibility in imposing appropriate discipline upon its members would be greatly limited. Unions would be forced to choose between no penalty and severe penalties. But, indeed, courts have not adopted plaintiffs' interpretation. In Morrisey v. National Maritime Union,397 F. Supp. 659, 669 (S.D. New York 1975), the court held that "whether a particular action constitutes discipline is to be determined by its practical effect." In Tincher v. Piasecki, supra, the court did not find improper discipline where a union suspended a member from the right to hold office and to appeal, though the plaintiff was not suspended or expelled from membership. Similarly, courts have construed "otherwise discipline" to mean removal of a member from his job (Gross v. Kennedy, 183 F. Supp. 750 (1960) and revocation of a resolution to share work (Rekant v. Shochtay-Gasos Union, Local 446, Etc., 205 F. Supp. 284 (1962)). In Rekant,

at 288, the court said that the words "otherwise disciplined" have

> a readily understood meaning. They apply whenever discipline is imposed on a Union member in any manner other than by an act of suspension or of complete severance of membership.

In their Brief, plaintiffs refer to the definition of "member" of a labor organization in the LMRDA. This definition contains a limitation upon membership rights where a member has been suspended. Nowhere in the definition is there an expression or implication that a suspension cannot deprive a member of only some of these membership rights. Furthermore, §101(a)(5) of the Act subjects a member's right to attend membership meetings to "reasonable rules and regulations." Included within "reasonable rules and regulations" is a union's right to discipline its members after the opportunity for and a fair hearing with notice of charges of violations of its by-laws or constitution. This, the Trial Committee, in the instant case, has done.*

The case which the plaintiffs cite (Stachan v. Weber, 535 F.2d 1202, 92 LRRM 2959 (9th Cir. 1967)) to support their position that a modified suspension may not be imposed is inapplicable. There the union attempted to bar members from membership meetings in order to discipline them for exercising their freedom of expression which was clearly within the members' rights.

In the instant case, the infraction plaintiffs were charged with and the reason for the discipline had nothing to do with freedom of expression or other protected activity.

---

* See also §101(a)(1) and §101(a)(2) as well as Art. 20, §1 (p. 46) of the Union Constitution (JA 489) in which the language of §101(a)(5) is set forth almost haec verba.

The above discussion still represents appellants' position on the discipline issue, although we maintain that this issue, as with the other issues raised by appellees, was not decided by the Court below and they are in no way involved in the instant appeal from that decision.

Dated: New York, New York
November 5, 1976

Respectfully submitted,

EMIL SCHLESINGER
Attorney for Defendant-Appellant
Amalgamated Ladies' Garment Cutters'
Union, Local 10 of ILGWU
218 West 40th Street
New York, New York 10018
(212) OX 5-0850

MAX ZIMNY
Attorney for Defendant-Appellant
International Ladies' Garment Workers'
Union, AFL-CIO
1710 Broadway
New York, New York 10019
(212) 265-7000

APPENDICES

BURTON H. HALL
ATTORNEY AND COUNSELLOR AT LAW
401 BROADWAY
NEW YORK, N. Y. 10013
431-0114

September 11, 1976

RECEIVED
SEP 13 1976
I.L.G.W.U.
LEGAL DEPT.

Emil Schlesinger, Esq.
Amalg. Ladies' Garment Cutters' Local 10
218 West 40th Street
New York, N.Y., 10018

RE: Rosario v. Amalg. Ladies' Garment Cutters
76 Civ. 3204 (CBM)

Dear Mr. Schlesinger:

As you know, on September 9, 1976 -- the morning after he had appeared in Court in connection with the above matter -- Mr. Rosario was fired by his employer, Galaxy Costumes. Mr. Rosario filed a grievance with Business Agent Pastel and, after a brief inquiry, Mr. Pastel asked Mr. Rosario to come to the Local 10 office.

When Mr. Rosario appeared at the Local 10 office, however, he was grilled by you about his suit against Local 10, about conversations between himself and his counsel (myself), and about charges filed by a fellow member and co-worker, David Spitzer, against both the employer and Local 10. In particular, I am advised that you used this occasion to demand that Mr. Rosario tell you what conversations had passed between myself and him concerning his participation in Court and his sitting at the counsel table.

So far as they have any bearing on the grievance filed with Local 10, the answers to your questions are these: Mr. Rosario was present in Court as a witness in what was expected to be an evidentiary hearing. He was a necessary witness, since he had and h irst-hand knowledge of two facts disputed by Local 10 on affid s: namely, what was said by the Trial Committee Chairman when h ed the Trial Committee out of the hearing room, and whether or not the door to the room in which it conducted further proceedings was locked.

For your further information, I asked Mr. Rosario to sit at the counsel table next to me so that he could assist me in going through the voluminous papers in this case.

I protest your harrassment of my client under the guise of hearing his grievance. I request that, if you want to know what I said to him or he to me, either concerning his sitting at the counsel table or concerning any other matter incident to the above case, you ask me, not him.

I must add, also, that the circumstances of Mr. Rosario's discharge by his employer raise a question of what role the Union played in that discharge. It is not likely that the employer would have fired him because he took the afternoon off to come to Court, unless it were given some encouragement to do so by the Union. But for this instance, it has been the employer's consistent practice

to allow cutters to take time off for personal reasons. Since Mr. Rosario gave the customary notice that he would take the afternoon of September 8 off in order to be in Court -- and the employer gave its consent -- the discharge appears to have resulted from some further communication between the employer and (presumably) the Union.

Very truly yours,

cc.: Hon. Constance Baker Motley, USDJ
Max Zimny, Esq.

AMALGAMATED LADIES' GARMENT CUTTERS' UNION
LOCAL 10 ILGWU

GERALD GROSSMAN
Manager-Sec'y

WILLIAM WEISS
Assistant Manager

NAT KLEIN
Sec'y-Executive Board

September 14, 1976

Burton H. Hall, Esq.
401 Broadway
New York, New York 10013

Re: Rosario v. Amalgamated Ladies' Garment Cutters 76 Civ.3204 (CBM)

Dear Sir:

Your letter of September 11th has just come to my attention.

In answer, I state unequivocally that the contents of your letter are tissues of unadulaterated lies, typical of the lies which you put into the affidavits of plaintiffs, Rosario and Cabel, and witness Spitzer, and in your briefs and in your argument before Judge Motley on September 8, 1976.

By sending a copy of your letter to Judge Motley containing your lies, you undoubtedly intend to influence her decision in your favor; but I am certain that she will not be fooled by your stratagem.

The true facts are that I did not inform anybody at all in Local 10 that Rosario was present at the argument on September 8, 1976, before Judge Motley until the next day at about 11:45 a.m. after I had a meeting with an accountant to determine what books and records I should include in a subpoena which I was preparing to serve upon Galaxy Garment Corp. for production before the Impartial Chairman who will hear the complaint of violations of the Collective Agreement which I drew as counsel for Local 10 and which the Local filed with the Association of which this Employer is a member, based upon the charges made by three of its employees: Rosario, Spitzer and Kotler. A copy of the charges is annexed.

After interviewing an accountant who, at Local 10's request, examined the books and records of the Employer, and in the presence of Mr. Gerald Grossman, Manager of Local 10, Mr. William Weiss, Assistant Manager of Local 10, and Mr. Nat Klein, Secretary-Executive Board Local 10, Mr. Edward Pastel, the Business Agent of Local 10 in charge of the shop of the Employer, entered my office at Local 10 at about 11:45 a.m. with Rosario and announced that Rosario had been fired that morning when he came to work for failing to work on the afternoon of the day before.

I am informed by Mr. Pastel that he had spoken to the Manager of Local 10 at about 9:20 a.m. that day and told him that Rosario was with him and said he had been discharged that morning by Galaxy because he did not come to work in the afternoon of the day before. Pastel asked Rosario why he did not come to work and he replied that it was because of personal reasons. Pastel asked him what the reasons were and Rosario did not answer. However, Rosario contended that Galaxy had given him permission to be absent in the afternoon. I am also informed that the Manager of Local 10 told Pastel to go to the firm with Rosario to see whether he could reinstate Rosario to his job.

When Pastel entered my office at 11:45 a.m. with Rosario he told the Manager that he was unable to reinstate Rosario to his job and that the firm contended that it did not give Rosario permission to be absent because he was working as part of a team of two which required the presence of both to insure a proper flow of product and that one man alone could not handle it effectively.

It was at that point that I asked Rosario what his personal reasons were for being absent the afternoon of the day before. He said to me, "You know. You saw me in court." I did ask him why it was necessary for him to be in court since there was to be only an argument among the lawyers. He told me that his lawyer had asked him to be present.

I then asked Rosario about the meeting which I held with him, Spitzer, and Kotler in my office on August 17, 1976, when I was questioning them about their charges against Galaxy for the purposes of preparing a complaint of Local 10 against Galaxy on their behalf and I told him that since they had asked for the appointment it wasn't very nice of them not to have

advised me that Spitzer had filed a charge with the NLRB against Local 10 charging it with invidious representation. At that point Rosario flared up, became very angry and yelled, "I'm here for my discharge and nothing else," and he stormed out of the room. Thereupon, Mr Grossman ordered Mr. Pastel to prepare a complaint against Galaxy for unjustifiably discharging Rosario with back pay. A copy of the complaint is attached. The foregoing is an accurate statement of what actually occurred.

The complaint was mailed on the same day, Thursday, September 9th, to the Association of which Galaxy is a member. That is required under the collective agreement which also requires that Local 10 and the Association shall have five days within which to adjust the complaint. A Saturday and Sunday intervened. On September 13th, yesterday, the Labor Manager of the Association called Pastel for an appointment to adjust the complaint. The appointment was made for this morning, September 14th, at 10:00 a.m., at the Employer's cutting room premises. Pastel notified Rosario by telegram to come to his office at 9:15 a.m. A copy of the telegram is attached.

This morning at 9:15 a.m., Rosario appeared at Pastel's office and wanted to know why he had to be present at the adjustment meeting. Pastel told him that he would not go to the adjustment meeting unless Rosario accompanied him and was ready to answer any question which the Employer might raise; otherwise Pastel could not properly represent him in his absence. Rosario unwillingly accompanied Pastel to the adjustment meeting. As a result of very difficult negotiations that lasted one hour, the Association ordered Galaxy to reinstate Rosario forthwith with backpay. Rosario returned to work this morning at approximately 11:05 a.m.

The statement in your letter that the argument on your motion for a preliminary injunction and Local 10's motion for summary judgment was expected to be an evidentiary hearing is as untrue as your other statements. You knew it was intended to be an argument and not an evidentiary hearing. Indeed, if, as you say, it was intended to be an evidentiary hearing why did you not also bring with you Vega, Cabel and Spitzer. Cabel, Spitzer and Rosario made principle affidavits for the plaintiffs in the pending case.

Your statement that you asked Mr. Rosario to sit at the counsel table next to you so that he could assist you in going through the voluminous papers in your possession is another one of your typical lies. Mr. Rosario was no more able to assist you in doing that than I would have been. I sat at the counsel table in back of both of you and neither you nor he went through any papers.

The last paragraph of your letter is again typical of the scurrilous and defamatory statements which you made by indirection and implication and which constitute your stock in trade. They are not only entirely untrue, but are maliciously false.

Very truly yours,

Emil Schlesinger
Counsel to Local 10

ES:vw

attach.

cc: Hon. Constance Baker Motley, USDJ
Max Zimny, Esq.

AMALGAMATED LADIES' GARMENT CUTTERS' UNION

LOCAL 10 ILGWU

GERALD GROSSMAN
Manager-Sec'y

WILLIAM WEISS
Assistant Manager

NAT KLEIN
Sec'y-Executive Board

Emil Schlesinger, Counsel

August 20, 1976

National Skirt & Sportswear Association, Inc.
225 West 34th Street
New York, N.Y. 10001

Re: Galaxy Costume, Corp.
525 West 37th Street
New York, N.Y.

Gentlemen:

We hereby file complaint against the above named Firm, a member of your association and bound under collective labor agreements of which Local 23-25. ILGWU, entered into on behalf of itself and Local 10 and others with your association, dated June 1, 1973, and as agreed upon as of June 1. 1976, in the following respects:

1. Wilfully and deliberately sending collars and cuffs to be cut from simulated fabric to contractors not in contractual relations with Local 23-25, ILGWU. This cutting was always done by cutters who were attached to the Firm's shop on its premises by members of Local 10.

2. Wilfully and deliberately sending piece goods for cutting to nondesignated contractors.

3. Wilfully and deliberately sending work to contractors for cutting which was not sewn by such contractors.

4. Wilfully and deliberately sending piece goods to contractors for cutting during the period when all of the cutters attached to the Firm's shop were not fully supplied with work.

EXHIBIT 1

5. Wilfully and deliberately depriving the number of cutters attached to the Firm's shop who usually did nothing but cut simulated fur collars and cuffs of the opportunity of so doing.

6. Wilfully and deliberately sending work to a contractor to be cut in excess of the contractor's capacity to manufacture the number of garments cut without giving notice to Local 10 of the name and address of the contractor where the excess will be manufactured.

7. Wilfully and deliberately sending uncut goods to a contractor to be cut without notifying Local 10 of the name and location of such contractor and the quantity and style numbers of the garments to be cut there.

8. Wilfully and deliberately failing and refusing to comply with the memorandum agreement of settlement dated July 13, 1976, of Local 10's complaint against the Firm dated July 6, 1976.

9. Wilfully and deliberately engaging in conduct which violated the provisions in the collective agreements dealing with imports and purchases of garments.

10. Wilfully and deliberately threatening the employment opportunities of cutters attached to the Firm's shop because of their complaints made to the Firm of violations of the collective agreements.

Local 10 demands an award ordering the Firm to cease and desist from violating the collective agreements aforementioned in the respects noted and in any other respect and demands an award for damages to each cutter attached to the Firm's shop who has suffered the same by reason of the aforementioned violations as well as liquidated damages to Local 10.

Please assign your representative to meet immediately with Edward Pastel who is the Business Agent of the cutters attached to the Firm's shop for the purpose of attempting an adjustment of this complaint. Failure to reach an adjustment by 5:00 P.M. Friday, August 27, 1976. will result in this complaint being placed before the Impartial Chairman.

Very truly yours,

Gerald Grossman

Gerald Grossman
Manager-Secretary

GG:SM
opeiu:153

NSSA 8/20/76

AMALGAMATED LADIES' GARMENT CUTTERS' UNION

GERALD GROSSMAN
Manager-Sec'y

WILLIAM WEISS
Assistant Manager

NAT KLEIN
Sec'y-Executive Board

September 9, 1976

Mr. Edward Weissman, Manager
National Skirt and Sportswear Association, Inc.
225 West 34th Street
New York, N.Y. 10001

Re: Galaxy Costume Corp.
225 West 31st Street
NewYork, N.Y.

Dear Mr. Weissman:

Our member Tomas Rosario, Ledger #26288, employed by the above captioned firm, a member of your association, was unjustifiably discharged on this date.

We demand his immediate reinstatement and damages for loss of wages under Article 29 of our collective agreement.

Very truly yours,

Gerald Grossman

Gerald Grossman
Manager-Secretary

GG:SMS
ope iu:153

EXHIBIT 2

MAILGRAM SERVICE CENTER
MIDDLETOWN, VA. 22645

western union Mailgram®

UNITED STATES POSTAL SERVICE U.S. MAIL

2-029480E257002 09/13/76 ICS IPMMTZZ GSP NYAB
1 2126950850 MGM TDMT NEW YORK NY 09-13 0134P EST

LOCAL 10 ILGWU A LAWRENCE .
218 WEST 40 ST
NEW YORK NY 10018

THIS MAILGRAM IS A CONFIRMATION COPY OF THE FOLLOWING MESSAGE:

2126950850 TDMT NEW YORK NY 28 09-13 0134P EST
PMS TOMAS ROSARIO , DLR
1291 SPOSSORD APT 6B
BRONX NY 10474
PLEASE BE IN MY OFFICE ROOM 707 AT LOCAL 10 218 WEST 40 BY 930AM
TUESDAY SEPTEMBER 14 WITHOUT FAIL IN REGARDS TO YOUR EMPLOYMENT AT
GALAXY COSTUME
ED PASTEL BUSINESS AGENT

13134 EST

MGMCOMP MGM

EXHIBIT 3

APPENDICES

BURTON H. HALL
ATTORNEY AND COUNSELLOR AT LAW
401 BROADWAY
NEW YORK, N. Y. 10013
431-9114

September 11, 1976

Emil Schlesinger, Esq.
Amalg. Ladies' Garment Cutters' Local 10
218 West 40th Street
New York, N.Y., 10018

RE: Rosario v. Amalg. Ladies' Garment Cutters
76 Civ. 3204 (CBM)

Dear Mr. Schlesinger:

As you know, on September 9, 1976 -- the morning after he had appeared in Court in connection with the above matter -- Mr. Rosario was fired by his employer, Galaxy Costumes. Mr. Rosario filed a grievance with Business Agent Pastel and, after a brief inquiry, Mr. Pastel asked Mr. Rosario to come to the Local 10 office.

When Mr. Rosario appeared at the Local 10 office, however, he was grilled by you about his suit against Local 10, about conversations between himself and his counsel (myself), and about charges filed by a fellow member and co-worker, David Spitzer, against both the employer and Local 10. In particular, I am advised that you used this occasion to demand that Mr. Rosario tell you what conversations had passed between myself and him concerning his participation in Court and his sitting at the counsel table.

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I must add, also, that the circumstances of Mr. Rosario's discharge by his employer raise a question of what role the Union played in that discharge. It is not likely that the employer would have fired him because he took the afternoon off to come to Court, unless it were given some encouragement to do so by the Union. But for this instance, it has been the employer's consistent practice

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cc.: Hon. Constance Baker Motley, USDJ
Max Zimny, Esq.

AMALGAMATED LADIES' GARMENT CUTTERS' UNION
LOCAL 10 ILGWU

GERALD GROSSMAN
Manager-Sec'y

WILLIAM WEISS
Assistant Manager

NAT KLEIN
Sec'y-Executive Board

September 14, 1976

Burton H. Hall, Esq.
401 Broadway
New York, New York 10013

Re: Rosario v. Amalgamated Ladies' Garment Cutters 76 Civ.3204 (CBM)

Dear Sir:

Your letter of September 11th has just come to my attention.

In answer, I state unequivocally that the contents of your letter are tissues of unadulaterated lies, typical of the lies which you put into the affidavits of plaintiffs, Rosario and Cabel, and witness Spitzer, and in your briefs and in your argument before Judge Motley on September 8, 1976.

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218 WEST 40th STREET NEW YORK, N.Y. 10018 • Area Code (212) 695-0850

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Very truly yours,

Emil Schlesinger
Counsel to Local 10

ES:vw

attach.

cc: Hon. Constance Baker Motley, USDJ
Max Zimny, Esq.

AMALGAMATED LADIES' GARMENT CUTTERS' UNION

GERALD GROSSMAN
Manager-Sec'y

WILLIAM WEISS
Assistant Manager

NAT KLEIN
Sec'y-Executive Board

Emil Schlesinger, Counsel

August 20, 1976

National Skirt & Sportswear Association, Inc.
225 West 34th Street
New York, N.Y. 10001

Re: Galaxy Costume, Corp.
525 West 37th Street
New York, N.Y.

Gentlemen:

We hereby file complaint against the above named Firm, a member of your association and bound under collective labor agreements of which Local 23-25, ILGWU, entered into on behalf of itself and Local 10 and others with your association, dated June 1, 1973, and as agreed upon as of June 1. 1976, in the following respects:

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EXHIBIT 1

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Please assign your representative to meet immediately with Edward Pastel who is the Business Agent of the cutters attached to the Firm's shop for the purpose of attempting an adjustment of this complaint. Failure to reach an adjustment by 5:00 P.M. Friday, August 27, 1976. will result in this complaint being placed before the Impartial Chairman.

Very truly yours,

Gerald Grossman

Gerald Grossman
Manager-Secretary

GG:SM
opeiu:153

NSSO 8/20/76

AMALGAMATED LADIES' GARMENT CUTTERS' UNION

GERALD GROSSMAN
Manager-Sec'y

WILLIAM WEISS
Assistant Manager

NAT KLEIN
Sec'y-Executive Board

September 9, 1976

Mr. Edward Weissman, Manager
National Skirt and Sportswear Association, Inc.
225 West 34th Street
New York, N.Y. 10001

Re: Galaxy Costume Corp.
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NewYork, N.Y.

Dear Mr. Weissman:

Our member Tomas Rosario, Ledger #26288, employed by the above captioned firm, a member of your association, was unjustifiably discharged on this date.

We demand his immediate reinstatement and damages for loss of wages under Article 29 of our collective agreement.

Very truly yours,

Gerald Grossman

Gerald Grossman
Manager-Secretary

GG:SMS
opeiu:153

EXHIBIT 2

MAILGRAM SERVICE CENTER
MIDDLETOWN, VA. 22645

western union Mailgram®

UNITED STATES POSTAL SERVICE

2-029480E257002 09/13/76 ICS IPMMTZZ CSP NYAB
1 2126950850 MGM TDMT NEW YORK NY 09-13 0134P EST

LOCAL 10 ILGWU A LAWRENCE .
218 WEST 40 ST
NEW YORK NY 10018

THIS MAILGRAM IS A CONFIRMATION COPY OF THE FOLLOWING MESSAGE:

2126950850 TDMT NEW YORK NY 28 09-13 0134P EST
PMS TOMAS ROSARIO , DLR
1291 SPOSSORD APT 6B
BRONX NY 10474
PLEASE BE IN MY OFFICE ROOM 707 AT LOCAL 10 218 WEST 40 BY 930AM
TUESDAY SEPTEMBER 14 WITHOUT FAIL IN REGARDS TO YOUR EMPLOYMENT AT
GALAXY COSTUME
ED PASTEL BUSINESS AGENT

13134 EST

MGMCOMP MGM

EXHIBIT 3